Supreme Court, U.S.
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In The

# Supreme Court of the United States

JOLENE McKEEL and GERALD McKEEL,

*Petitioners,*

v.

THE STATE OF COLORADO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the "inextricably intertwined" aspect of the *Rooker-Feldman* Doctrine bar a discrete constitutional challenge to state statute when the relief requested (giving rise to standing to challenge the statute in the first place) includes declaration that the state judicial proceedings held pursuant to the statute are null and void?

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## OPINIONS BELOW

The Tenth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is reported at 74 Fed. Appx. 11 (2003), and reprinted in Appendix A. The District Court did not publish an opinion in this case. Its order and pertinent ruling from the bench are reprinted in Appendix B.

## JURISDICTION

The date of entry of the Tenth Circuit Court of Appeals decision sought to be reviewed herein is August 25, 2003. The statutory provision conferring jurisdiction on the Court to review this decision is 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331. Federal Question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343.
Civil Rights and Elective Franchise.

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: ***

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution

of the United States or by any Act of Congress providing of equal rights of citizens or of all persons within the jurisdiction of the United States; ***

28 U.S.C. § 2201. Creation of Remedy.

(a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202. Further Relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment.

## STATEMENT OF THE CASE

On July 13, 1994, the State District Court for Mesa County, Colorado, issued a pick-up order for then two-month-old Baby Girl (daughter of Petitioner Jolene McKeel, granddaughter of Petitioner Gerald McKeel) which was initiated by the Mesa County Social Services Department. The order was defective, and issued and executed unlawfully. Entrance to the home was gained by false pretenses, the baby clutched away from the mother, essentially a kidnaping of the infant by the Mesa County Social Services Department with assistance of the Grand Junction Municipal Police Department.

In the subsequent "abuse and neglect" and dispositional proceeding per Colorado Children's Code, there was a stipulation for adjudication and disposition of abuse and neglect entered into without appropriate and full advice of the prior counsel, which contained a "corrective treatment plan" for Petitioner Jolene McKeel that was never initiated by Mesa County Social Services Department and was therefore impossible for her to comply with (particularly as a disabled individual) within the designated time frame.

On December 6, 1995, over issues of compliance with the "plan," a bench trial was conducted by the same judge who presided over the "abuse and neglect" proceedings. Petitioner Gerald McKeel intervened seeking alternative guardianship of his granddaughter. Petitioners were precluded from a jury trial because of Section 19-3-602(4), Colorado Revised Statutes, which provides that "[t]here shall be no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship." The mother's parental rights were permanently terminated, and the intervenor grandfather's request for alternative guardianship was denied. No clear reason for this denial was enunciated by the court. Derivatively the grandfather's rights to visitation were terminated when the mother's rights were terminated under Colorado law. No argument was advanced by prior counsel as to unconstitutionality of Section 19-3-602(4).

Appeal from the above decision was taken, by prior counsel, to the Colorado State Court of Appeals where the Court denied relief. Subsequent Petition for Writ of Certiorari was filed, by prior counsel, with the Colorado State Supreme Court, also to no avail on the issues of: (i) improper exclusion of evidence and inquiry into the predispositional investigation, the "pick-up" order, and the

particular execution and taking of the child by Mesa County Social Services; (ii) appropriateness of the "treatment plan" and what constituted a reasonable time for compliance by this particular mother; and (iii) appropriateness of the court's evaluation of alternatives to permanent termination. The Petition for Writ of Certiorari to the Colorado Supreme Court was denied on September 2, 1997. Again, no argument was advanced in the state appellate courts as to unconstitutionality of Section 19-3-602(4), Colorado Revised Statutes.

Suit was filed (with present counsel representing Petitioners) on January 17, 2002, in the U.S. District Court for the District of Colorado for declaratory relief under Title 28 U.S.C. §§ 2201 and 2202, and Rule 57, Federal Rules of Civil Procedure, to declare Section 19-3-602(4), Colorado Revised Statutes, both facially and as applied in violation of the First, Ninth and Fourteenth Amendments to the U.S. Constitution, to declare Section 19-3-602(4), Colorado Revised Statutes, and the judgment in the subject termination proceedings held thereunder null and void. Jurisdiction was predicated on Title 28 U.S.C. §§ 1331 and 1343(a)(3). Petitioners had standing as affected parent and grandparent to request the subject declaratory relief under Article III of the U.S. Constitution, and the U.S. District Court had the power to grant the requested relief under Title 28 U.S.C. § 1391.

Petitioners argued in U.S. District Court that termination of parental (derivatively grandparents') rights by the State involves a fundamental liberty interest in family life and the integrity of the family unit as protected by the U.S. Constitution's Fourteenth Amendment Due Process Clause, the right to intimate association guaranteed by the First Amendment, and the right to familial privacy guaranteed by the Ninth Amendment to the U.S. Constitution. Before an individual may be deprived of such fundamental

rights he/she must be accorded the fullest and most complete panoply of protections and substantive safeguards associated with such fundamental Constitutional rights, which includes the right to a jury trial. The Respondent State of Colorado, by enactment of Section 19-3-602(4), Colorado Revised Statutes, has not taken the least restrictive, heightened protection required of said fundamental rights, and said law is in violation of the above constitutional protections. The U.S. District Court concluded that the subject statute was not unconstitutional and granted the Motion to Dismiss on June 3, 2002. That decision was premised upon the reasoning that Due Process is sufficiently ensured by a higher standard of proof in the termination proceeding, citing *Santosky v. Kramer*, 455 U.S. 745 (1982). (Appendix B-4)

The parties addressed the above constitutional issues in their briefings to the U.S. District Court and the Tenth Circuit Court of Appeals. No argument was advanced by Respondent that the Tenth Circuit lacked jurisdiction until the Tenth Circuit Court of Appeals, *sua sponte*, issued its April 7, 2003, Order (Appendix C) requesting that the parties address jurisdictional issues. The Tenth Circuit Court of Appeals' August 25, 2003, Order And Judgment (Appendix A) only addressed the jurisdictional issues concluding that "any facial claim the McKeels may have asserted would be barred by the 'inextricably intertwined' test of *Rooker-Feldman.*" (Appendix A-8) The case was dismissed for lack of jurisdiction because of the "inextricably intertwined" aspect for the *Rooker-Feldman* Doctrine, this because the U.S. District Court was asked to declare the state court proceedings held pursuant to the allegedly unconstitutional statute null and void. The application and meaning of the term "inextricably intertwined" under

the *Rooker-Feldman* Doctrine has become the sole issue now before this Court.

## REASONS FOR GRANTING THE WRIT

**THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS ENTERED A DECISION ON AN IMPORTANT QUESTION OF FEDERAL JURISDICTION LAW, NAMELY APPLICATION OF THE TERM "INEXTRICABLY INTERTWINED" UNDER THE *ROOKER-FELDMAN* DOCTRINE SO AS TO BAR A DISCRETE CHALLENGE TO THE CONSTITUTIONALITY OF A STATE STATUTE WHERE THE RELIEF SOUGHT IS NULLIFICATION OF THE STATUTE AND DECLARATION THAT PROCEEDINGS HELD THEREUNDER ARE NULL AND VOID (PARTY INTEREST FOR STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE IN THE FIRST PLACE). THE TENTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER, OTHER CIRCUITS ARE IN CONFLICT ON THE SAME IMPORTANT ISSUE, THE DECISIONS WITHIN CIRCUITS ARE IN CONFLICT ON THIS IMPORTANT ISSUE, THE INSTANT DECISION AND DECISIONS OF OTHER CIRCUITS CONFLICT WITH *D.C. COURT OF APPEALS V. FELDMAN*, 406 U.S. 462 (1983), AND THIS CASE INVOLVES A FUNDAMENTAL AND IMPORTANT POINT OF FEDERAL LAW NOT CLEARLY DECIDED BY THIS COURT AND WHICH IS IN NEED OF BEING CLARIFIED AND SETTLED.**

This Court held in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 483-84 fn. 16, 486-87 (1982) that:

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's . . . [decision, even if those challenges allege that the state court's action was unconstitutional,] then the district court is in essence being called upon to review . . . [that] state-court decision. This the district court may not do. * * *
>
> [However, the] United States district courts . . . [do] have subject-matter jurisdiction over general challenges to state . . . [law] which do not require review of a final state-court judgment in a particular case.

The Third, Fifth and Eighth Circuits allow for a discrete constitutional challenge in U.S. district court where the result of invalidating a state statute would void the particular state court proceedings held pursuant to said statute and positively affect the plaintiff's interests (grounds for standing). *See: Davis v. Thornburgh*, 903 F.2d 212, 221 fn. 17 (3rd Cir. 1990) (discussing viability of *Alsager, infra*); *Alsager v. District Court of Polk Cty., Iowa (Juv. Div.)*, 518 F.2d 1160, 1165-66 (8th Cir. 1975) ("[T]he Alsagers [were] properly in federal court seeking to protect their federal constitutional rights even though they do not claim to have exhausted all state remedies.") *See also, Rhoades v. Penfold*, 694 F.2d 1043, 1047 (5th Cir. 1983):

> Rhoades' initial § 1983 complaint requests that the district court declare the state court's judgment null and void and enjoin the state from seeking to enforce its judgment. Rhoades alleged that the proceeding itself constituted a deprivation of her constitutional rights since she was not provided counsel. Significantly, Rhoades was not claiming that the district court should review the

> state court's rulings on the substantive issues involved in the termination proceeding. To the contrary, Rhoades simply maintained that the entire proceeding, quite apart from the substantive issues of the termination proceeding, was constitutionally defective. When Rhoades' complaint is viewed in this light, it is clear that it falls within the provisions of § 1983 and its jurisdictional counterpart. *See* 28 U.S.C. § 1343[(a)(3)].

The Tenth Circuit has expressed that the term "inextricably intertwined" is unclear, that the term "does not provide district courts with a bright line rule." *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir. 1984). Because the concept was not clearly explained by this Court in *Feldman, supra*, there are conflicting interpretations and applications adversely and differentially affecting litigants' underlying substantive constitutional protections among the circuits. Substantive constitutional rights are protected in some jurisdictions while not in other jurisdictions. And there are inconsistent decisions within the circuits. *See* the Eighth Circuit decision in *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995) ("*Rooker-Feldman* precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling."), citing for this result *Landers Seed Co. v. Champaign Nat'l Bank*, 15 F.3d 729, 732 (7th Cir.), *cert. denied*, 513 U.S. 811 (1994).

The Tenth Circuit has "refused to allow a plaintiff to hide behind the language of a general attack on state procedures while bringing what was in reality a claim to overturn a state court decision." *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991). *See also, Anderson v. Colorado*, 793 F.2d 262, 263 (10th Cir. 1986), and the case at bar. *But see, Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103 (10th

Cir. 2000), where a general challenge to Utah adoption laws was not construed under the "inextricably intertwined" rule as an attempt to appeal a particular adoption decree even though the proceedings held under the allegedly unconstitutional state statue would be rendered void.

Cases such as *Charchenko, Landers Seed Co., Facio* and *Anderson, supra,* and the instant case, create a "Catch 22." Whenever the *Rooker-Feldman* "inextricably intertwined" rule does not bar a constitutional challenge, lack of standing would bar the constitutional challenge.[1]

## CONCLUSION

For the above-stated reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[1] *See Friends Of Earth v. Laidlaw Environmental Servs.*, 528 U.S. 167, 180-81 (2000).

# APPENDIX A
# UNITED STATES COURT OF APPEALS
# TENTH CIRCUIT

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JOLENE MCKEEL and
GERALD MCKEEL,

Plaintiffs-Appellants,

v.

THE STATE OF COLORADO,

Defendant-Appellee.

No. 02-1303
(D.C. No. 02-Z-104)
(D. Colo.)

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## ORDER AND JUDGMENT*

(Filed Aug. 25, 2003)

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Before **EBEL**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **MURPHY**, Circuit Judge.

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Plaintiffs-Appellants Jolene McKeel (Baby Girl's mother) and Gerald McKeel (Baby Girl's grandfather) argue on appeal that it is unconstitutional for Colorado to

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* This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

allow the final termination of parental rights to be decided by a judge instead of a jury. The plaintiffs-appellants, however, come before us late in the procedural history of their case. They failed to comply with an "abuse and neglect" plan to change the way they cared for their Baby Girl, and the Colorado state courts affirmed the termination of their parental rights.[1] We find that the exercise of federal jurisdiction over this case is barred by application of the *Rooker-Feldman* doctrine because plaintiffs-appellants seek, *inter alia,* to challenge on appeal the final decision of the Colorado state courts regarding custody of the Baby Girl.

## BACKGROUND

Because we dismiss plaintiffs-appellants' claim for lack of jurisdiction, we describe the facts of their case only briefly.

In the Colorado state system, first there must be a determination whether a child is neglected or abused such that the termination of parental rights would be appropriate. Both parties agree there is a right to a jury at this stage of the proceedings, and we accept that for purposes of this appeal since it is not contested. After the finding of facts to support the termination of parental rights is made, the actual execution of the termination may be suspended for some period of time to allow parents an opportunity to comply with a treatment plan. If the parents do not follow

[1] Plaintiffs-Appellants have appealed unsuccessfully to the Colorado Supreme Court, but it is not clear whether they petitioned for a writ of certiorari from the U.S. Supreme Court.

the treatment plan, the suspended judgment is then enforced by a court and official termination of parental rights is entered. *See, e.g., L.L. v. People,* 10 P.3d 1271, 1275 (Colo. 2000) (en banc) (describing the procedure under Colorado law). At this termination proceeding, there is no right to a jury and the matter is decided by the court. Colo. Rev. Stat. § 19-3-602(4).

On July 13, 1994, the State District Court for Mesa County, Colorado issued an "emergency custody and pick-up order" for the Baby Girl at issue in the McKeels' case. Plaintiffs-Appellants[2] were scheduled for an "abuse and neglect" proceeding under the Colorado Children's Code in Colorado state courts and they were given notice that an unfavorable disposition on the facts might result in the termination of parental rights. *See generally* Colo. Rev. Stat. §§ 19-3-502, 19-3-503, 19-3-505, and 19-3-507. The McKeels stipulated to their abuse and neglect of the Baby Girl, however, so no trial occurred at this stage of the proceedings. Plaintiffs-Appellants were permitted to maintain revokable custody of the Baby Girl on the basis of a "corrective treatment plan" entered into with the state, but they ultimately failed to comply with its provisions.

On December 6, 1995, a Colorado state court judge found plaintiffs-appellants in violation of the treatment plan and entered the order terminating the McKeels'

[2] We use the term "plaintiffs-appellants" throughout this opinion for both McKeel adults. Jolene McKeel was party to all proceedings in state court and her father intervened at the final disposition to present another option to the court in awarding custody to him when it was clear his daughter would lose her parental rights.

parental rights.[3] Plaintiffs-Appellants appealed through the Colorado state court system, but provide no evidence they petitioned for a writ of certiorari from the U.S. Supreme Court.

On January 17, 2002, nearly five years after plaintiffs-appellants were denied relief by the Colorado Supreme Court, they filed suit in federal district court to attack Colorado's statute denying them a jury trial on the actual entry of the termination order. As of the time of the federal district court proceedings, the Baby Girl was almost eight years old and had been cared for by people other than the plaintiffs for more than six years. In the hearing before the federal district court, there was no answer to the judge's inquiry why the plaintiffs had waited so long to file their case.

The federal district court ruled from the bench to dismiss the suit. Throughout the hearing generally, the district court was troubled by why this case was in federal court and not in state court. The court, though, seemed to suggest three possible bases for its decision. First, the court said it did not have jurisdiction to restore the child to the plaintiffs because that was a matter for the state courts. Second, the court concluded that the Colorado statute denying a jury trial at the termination proceeding did not violate the federal constitution. Third, the court appeared to conclude that the plaintiffs had waived their claim for a jury determination when they knowingly

[3] Any rights Gerald McKeel had were terminated by extension of the termination of his daughter's rights to the child. *People ex rel. J.W.W.*, 936 P.2d 599, 601 (Colo. Ct. App. 1997).

entered into a stipulation at the first stage that a finding of abuse and neglect could be entered against them without a trial.

On appeal, the McKeels petition to have Colorado Revised Statute Section 19-3-602(4)[4] declared both facially unconstitutional, and unconstitutional as applied, rendering the state's previous termination proceedings "null and void." Plaintiffs-Appellants ask for Baby Girl to be "restored to" them, or, in the alternative, for a "jury trial [on] the subject termination proceedings."

We DISMISS the McKeels' appeal for lack of jurisdiction because application of the *Rooker-Feldman* doctrine bars their claim.

## DISCUSSION

We review all issues of jurisdiction and law *de novo*. *See, e.g., Elder v. Holloway,* 510 U.S. 510, 516 (1994); *Dang v. UNUM Life Ins. Co. of Am.,* 175 F.3d 1186, 1189 (10th Cir. 1999).

Pursuant to 28 U.S.C. § 1257, "federal review of state court judgments can be obtained only in the United States Supreme Court" and, of course, review is limited to issues of federal law. *Kenmen Eng'g v. City of Union,* 314 F.3d 468, 473 (10th Cir. 2002) (quoting *Kiowa Indian Tribe of Okla. v. Hoover,* 150 F.3d 1163, 1169 (10th Cir. 1998)).

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[4] Colo. Rev. Stat. § 19-3-602(4) reads: "There shall be no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship."

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the Supreme Court first held that the grant of statutory jurisdiction to the Court to review state court judgments could provide an independent basis for prohibiting collateral attack on state court judgments in the lower federal courts. The plaintiff in *Rooker* sought to have the judgment of a circuit court in Indiana, which had been affirmed by the Indiana Supreme Court, declared null and void in the lower federal courts as a violation of its federal constitutional right to contract. *Id.* at 414.

But the U.S. Supreme Court wrote:

> It affirmatively appears from the bill that the judgment was rendered in a cause wherein the [state] circuit court had jurisdiction of both the subject-matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs. *If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction.* If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding [only to the U.S. Supreme Court].

*Id.* at 415 (citation omitted and emphasis added).

Years later, the Supreme Court reaffirmed *Rooker's* central holding that federal district courts do not have jurisdiction to hear challenges to the validity of state court decisions appealable from the state system to the U.S. Supreme Court. *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983). As the Supreme Court

has articulated since, the effect of *Rooker-Feldman* is to preclude "a party losing in state court . . . from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy,* 512 U.S. 997, 1005-06 (1994); *Kenmen,* 314 F.3d at 473.

Plaintiff-Appellants essentially admit in their supplementary briefing that *Rooker-Feldman* may bar their challenge to the Colorado statute as applied. They argue, though, that their claim should be considered a challenge to the Colorado statute both as applied and more generally. They rely for this argument on a phrase from the *Feldman* case enabling a "general challenge" to a state statute to survive application of the *Rooker-Feldman* doctrine.

Under *Feldman,* a "general challenge" to the constitutionality of a statute may remain within a federal court's jurisdiction even after application of the *Rooker-Feldman* doctrine. *Feldman,* 460 U.S. at 482-83; *accord* Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 1502 (4th ed. 1996). The *Feldman* Court wrote that there was a distinction between as-applied challenges to statutes "seeking review in a federal district court of a state court's final judgment in a . . . matter" and general challenges "challenging the validity of a state . . . rule." *Feldman,* 460 U.S. at 483-84.

It is not clear what general challenge plaintiffs-appellants may have made to the Colorado statute aside from their as-applied challenge. They employed the word "facial" just once in their brief on appeal in an introductory paragraph and present no broader argument against the

Colorado statute distinct from the facts of their case as applied.[5] Although we do not believe that the McKeels have in fact asserted a general challenge separate from their challenge to the statute as applied, we may, nonetheless, easily determine that any facial claim the McKeels may have asserted would be barred by the "inextricably intertwined" test. Federal courts may not hear claims raised in the same suit as an issue barred by *Rooker-Feldman* if the claims are "inextricably intertwined" with the state court judgment. *Kenmen,* 314 F.3d at 475 (citing *Feldman,* 460 U.S. at 483 n.16).

A claim asserted in federal court is barred as "inextricably intertwined" with the state court judgment in which the case is rooted unless it falls into one of two categories. The first category consists of cases in which "the party does not request that the federal court upset a prior state-court judgment applying [the contested] law against the party, and ... the prior state-court judgment did not actually decide that the state law at issue was facially constitutional." *Kenmen,* 314 F.3d at 476 (citations and emphasis omitted). The second category consists of cases in which "a party may challenge state procedures for enforcement of a judgment [ ] where consideration of the underlying state-court decision is not required." *Id.* (citation omitted).

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[5] Traditionally, a party argued in an as-applied challenge that "a statute cannot be applied to her because its application would violate her personal constitutional rights." Richard H. Fallon, *As Applied and Facial Challenges and Third Party Standing,* 113 Harv. L. Rev. 1321, 1321 (2000). By contrast, a "facial" attack asserted that "a statute is more generally invalid" and should be struck down in all its applications. *Id.; id.* at 1326.

The McKeels' prayer on appeal was that we declare the Colorado statute to be unconstitutional, thereby rendering the state's previous termination proceedings "null and void" and "restor[ing]" the Baby Girl to them, or, in the alternative, granting a "jury trial [on] the subject termination proceedings." The McKeels' claim thus falls into neither of the two categories that might exempt it from being barred under the "inextricably intertwined" test for the *Rooker-Feldman* doctrine. Under the first category, the McKeels specifically request that the federal courts upset a prior state-court judgment applying Colorado's parental termination law against them. The McKeels' claim fails under the second category because we would be forced to consider the underlying Colorado state court judgment if we were to declare it "null and void" for the Baby Girl to be returned to the McKeels or for the McKeels to receive a new trial on the termination of their parental rights. Thus, even if the plaintiffs-appellants are raising a facial challenge, under the standard of the inextricably intertwined test for separate claims, no claim survives application of the *Rooker-Feldman* doctrine's bar on federal court jurisdiction.

## CONCLUSION

Accordingly, we hold that the *Rooker-Feldman* doctrine bars the McKeels' case from federal court and DISMISS the case for lack of jurisdiction.

ENTERED FOR THE COURT

David M. Ebel
Circuit Judge

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 02-Z-104 (MJW)

JOLENE MCKEEL and GERALD MCKEEL,

Plaintiffs,

v.

THE STATE OF COLORADO,

Defendant,

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## ORDER OF DISMISSAL AND JUDGMENT

(Filed June 3, 2002)

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This matter was before the Court on May 2, 2002, for oral argument on defendant's Motion To Dismiss. The Court heard the arguments and statements of counsel, and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that defendant's Motion To Dismiss is granted. It is

FURTHER ORDERED that the Complaint and cause of action are dismissed. It is

FURTHER ORDERED that the parties shall bear their own costs.

DATED at Denver, Colorado, this 3 day of June, 2002, *nunc pro tunc* May 2, 2002.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Senior Judge
United States District Court

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* * *

**RULING**

[18] *THE COURT:* Well, there is many questions that I have about this case. For example, why on earth did plaintiff wait [19] so long to file an action? I know that the attorney is new, so he may not know the answer to this. Why wasn't this case brought in the state court, rather than the Federal Court, so that it could be challenged under the Colorado Constitution as well as Federal, and the various interests of the best interests of the child, which are properly examined by state judges and not by Federal judges?

In any case, this court is going to grant the motion to dismiss. I know of no case law which supports any finding that Colorado Revised Statute 19-3-602(4) is in violation of the Federal Constitution. That's the statute which says there shall be no right to a jury trial at proceedings held to consider the termination of parent/child legal relations.

As pointed out by defendant's attorney bringing this motion, when parties appear and ask for a jury trial on dependency and neglect issues, they are well aware that the remedy can be termination, and they are or should be

well aware of the statute, which says that there is no jury trial for this second stage, for the remedy.

The second stage, which is a trial to the court, requires a higher burden of proof. It requires clear and convincing evidence, not preponderance of the evidence. It appears to me that satisfies due process regardless of who the fact-finder is, whether it be judge or jury.

There is no law, as I pointed out. Due process is [20] indeed ensured by the higher standard of proof. We do have the Supreme Court case, which I think was mentioned in the briefs, which talks about the higher standard of proof. And I'm referring to *Santosky vs. Kramer*, 455 U.S. 745, 1982.

And then, in addition, we have a Wyoming Supreme Court decision holding that the right to a jury trial in a parental termination action cannot be characterized as fundamental and finding that there is no right to a jury trial under their interpretation of the law in Wyoming. Wyoming is certainly a close and persuasive jurisdiction to Colorado.

So I wonder whether this issue is really one for the Colorado legislature. I don't know whether there has been an attempt made to change the statute. I don't know whether coming in after all these years and attempting to restore the child to the plaintiff would be in the best interests of the child. I have no jurisdiction to consider that. That's a matter for the state courts.

My conclusion after hearing the arguments, after considering the briefs, after looking at the law and the policy behind the law, is that the statute in question is not

unconstitutional and that the motion to dismiss must be granted and this case dismissed.

*  *  *

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# APPENDIX C
# UNITED STATES COURT OF APPEALS
# FOR THE TENTH CIRCUIT

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| | |
|---|---|
| JOLENE MCKEEL and GERALD MCKEEL,<br>Plaintiffs-Appellants,<br>v.<br>STATE OF COLORADO,<br>Defendant-Appellee. | No. 02-1303 |

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## ORDER

(Filed Apr. 7, 2003)

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On or before April 18, 2003, the parties shall file simultaneous supplemental briefs addressing:

1) Whether the district court or this court is deprived of jurisdiction in this case under the United States Supreme Court decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The parties should separately address the applicability of *Rooker-Feldman* to the claim of facial unconstitutionality as well as the claim of unconstitutionality as applied. *See Feldman*, 460 U.S. at 483-84; *Hart and Wechsler's Federal Courts and Federal System*, 1502 (4th ed. 1996).

2) Whether the appellants' claim of facial unconstitutionality of the law should be barred by the doctrine of issue preclusion if that claim had previously been

raised in the state court system. *See Eubanks v. Getty Oil Co.*, 896 F.2d 960, 962-64 (5th Cir.), *cert. denied*, 498 U.S. 898 (1960); *North Star Steele Co. v. Midamerica Energy Holdings Co.*, 184 F.3d 732, 737-38 (8th Cir.), *cert. denied*, 528 U.S. 1046 (1999); 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 4469, 4470.2 (2002).

3) If the appellants did not raise a facial challenge to the law in the state court system, should they now be barred from doing so under the doctrine of claim preclusion? *See Nash Cty. Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981); *Refrigerated Food Line, Inc. v. Republic Indus., Inc.*, 605 F.2d 412, 416 n. 8 (8th Cir. 1979); 18 Wright & Miller § 4470.1.

4) After the potential application of *Rooker-Feldman* to appellants' claims, would they continue to have a redressable claim for standing to assert a facial constitutional challenge? *See Davis v. Thornburgh*, 903 F.2d 212, 220-22 (3d Cir.), *cert. denied*, 498 U.S. 970 (1990); *Cleveland Surgi-Center, Inc. v. Jones*, 2 F.3d 686 (6th Cir.), *cert. denied*, 510 U.S. 1046 (1993); 627 F.2d 258 (D.C. Cir. 1980); *Miller v. Christopher*, 96 F.3d 1467, 1469-70 (D.C. Cir. 1996); 18B Wright & Miller § 4469.1

Entered for the Court

/s/ Patrick Fisher
Patrick Fisher
Clerk of Court

03-757

Supreme Court, U.S.
FILED
DEC 22 2003
OFFICE OF THE CLERK

NO.

# IN THE SUPREME COURT OF THE UNITED STATES

*JOLENE MCKEEL AND GERALD MCKEEL,*

**Petitioners,**

vs.

*THE STATE OF COLORADO,*

**Respondents.**

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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December 12, 2003

## QUESTION PRESENTED

Whether the *Rooker-Feldman* doctrine bars federal courts from hearing parties' claims which seek to attack collaterally a state court judgment terminating parental rights by requesting what in substance would be an appellate review of the state court judgment by asserting a federal challenge to the state court judgment.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not published, but is reported at 74 Fed. Appx. 11(2003), and is found in the Appendix A. The Tenth Circuit affirmed the judgment of the district court. The district court's opinion to dismiss the action is not published, and is found in the Appendix B.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its decision on August 25, 2003. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

On July 13, 1994, the Mesa County Department of Social Services ("County Department") removed Baby Girl from the care of her biological mother, the Petitioner Jolene McKeel ("Mother"). Shortly thereafter, the County Department filed a Petition for Dependency and/or Neglect action against Mother to declare Baby Girl dependent and/or neglected. Petitioner Gerald McKeel, (hereinafter "Grandfather"), intervened in the Dependency and Neglect action. The Dependency and Neglect Petition expressly warned that termination of parental rights may follow if a child is determined to be dependent or neglected. Section 19-3-202, C.R.S. (2002), provides the right to a jury trial for the adjudication of the Petition in Dependency and Neglect. Mother entered into a Stipulation for Adjudication/Disposition, whereby she waived her right to a jury trial and admitted to the Petition in Dependency and Neglect. The County Department attempted a reunification of Baby Girl to Petitioners, but Petitioners failed to follow

the treatment plan. After a trial to the court, the court terminated Mother's parental rights and denied Grandfather permanent custody/guardianship of Baby Girl. Thereafter, Baby Girl was deemed available for adoption and was adopted by the family which has cared for her for approximately eight years.

Petitioners appealed the state district court's termination judgment to the Colorado court of appeals. Petitioners, however, did not raise any issue relating to a right to a jury trial in this appeal. The Colorado court of appeals affirmed the judgment of the trial court. The Colorado Supreme Court denied certiorari on September 2, 1997. Once again, Petitioners did not raise any issue regarding the right to a jury trial. Petitioners did not seek certiorari to review the state court judgment to the United States Supreme Court.

On January 17, 2002, approximately six years after Baby Girl was adopted, Petitioners filed an action in the United States District Court for the District of Colorado requesting the Court to declare § 19-3-603(4), C.R.S. (2002), unconstitutional, because the statute denies the right to a jury for the trial to terminate parental rights, and asking for Baby Girl to be immediately returned, or for a new trial wherein they could obtain custody of Baby Girl.

The United States District Court dismissed Petitioners' claims, noting several bases for its decision. The district court determined that it did not have jurisdiction to restore Baby Girl to Petitioners, that the Colorado statute did not violate the federal constitution and that Petitioners waived their claim for a jury by entering into a stipulation at the Dependency and Neglect phase of the proceeding.

Petitioners appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed

the district court's decision to dismiss Petitioners' claims, due to lack of jurisdiction. The Tenth Circuit concluded the *Rooker-Feldman* Doctrine bars Petitioners' collateral attack on the state court judgment. (App. 2a). The Tenth Circuit denied Petitioners'challenge to the Colorado statute denying a right to a jury at the second phase of the Dependency and Neglect proceeding because it was "inextricably intertwined" with an attack on the state court judgment terminating Mother's parental rights.

## REASONS FOR DENYING THE WRIT

### A. The Decision Below Is Correct And Does Not Conflict With This Court's Decisions Or Other Circuit's Decisions. The Decision Is Consistent With This Court's *Rooker-Feldman* Doctrine And The Federal Comity Policy That A Party May Not Collaterally Attack A State Court Judgment By Raising A Federal Constitutional Issue In Federal Court When The Federal Challenge Is Inextricably Intertwined With The State Court Judgment.

1. The Tenth Circuit's decision is correct and does not conflict with this Court's decisions. Furthermore, the decision does not conflict with other Circuits' decisions, or Tenth Circuit's decisions. Thus, review by this Court is not warranted.

1a. The Tenth Circuit properly applied this Court's *Rooker-Feldman* doctrine to hold that Petitioners' federal claims are inextricably intertwined with the state court judgment, thus barring the federal court from hearing the action. The cases cited by Petitioners as conflicting Circuit decisions are distinguishable, and do not directly

apply the "inextricable intertwined" test of the *Rooker-Feldman* doctrine. For example, the Eighth Circuit's decision in *Alsager v. District Court of Polk Cty., Iowa (Juv. Div.),* 518, F.2d 1160, 1165-66 (8th Cir.1975), does not specifically address the "inextricably intertwined" test. On the contrary, years after the *Alsager* decision, the Eighth Circuit expressly applied the "inextricably intertwined" test in the same manner as the Tenth Circuit did in this case.[1] Thus, there is not a conflict between the Tenth and Eighth Circuits, and there is no conflict within the Eighth Circuit. The Fifth Circuit's *Rhoades v. Penfold* 694 F.2d 1043, 1047 (5th Cir. 1983), also does not apply the "inextricably intertwined" test, but instead creates a rule treating requests to void a state judgment on federal constitution grounds as a request for an injunction enjoining the enforcement of the state judgment. Here, an injunction of the state court termination order entered on December 6, 1995, is clearly not sought by Petitioners. Instead, Petitioners seek the reinstatement of parental rights by overturning the state court judgment, the immediate return of Baby Girl, or a new trial. Because there is not a distinct conflict between Circuits, the petition should be denied.

1b. In addition, there is no conflict in the application of the *Rooker-Feldman* doctrine within the Tenth Circuit.[2] The Tenth Circuit has consistently held that when a constitutional challenge to a state court judgment is made in federal court, such a challenge must pass the confines of the *Rooker-Feldman* doctrine for the federal court to hear the

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[1] *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995). *See also* App. 7a- 8a.

[2] The Tenth Circuit's opinion in *Kenman Eng'g v. City of Union*, 314 F.3d 468 (10th Cir. 2002) shows the Circuit's consistency in application of the *Rooker-Feldman* doctrine, and was cited by the Tenth Circuit in the below opinion. (See App. 5a- 8a).

matter. The test is applied on a case by case basis, which may result in different outcomes due to differing facts. Contrary to Petitioners' argument, various outcomes with factually different cases do not mean the doctrine is applied inconsistently. Petitioners cite *Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103 (10th Cir. 2000) as a conflicting decision within the Tenth Circuit. However, in *Johnson*, the plaintiff challenging the state adoption laws and state court judgment, was not a party to the prior state court adoption proceedings. The plaintiff's challenge was permitted under *Rooker-Feldman* because he did not have a prior opportunity to challenge the state procedures, and his constitutional challenge was actually a discrete challenge to the state adoption procedures (namely lack of notice), and did not dispute the actual merits of the particular state court ruling.[3] The facts of Petitioners' case do not mirror those of *Johnson*, thus resulting in a different outcome. Therefore, the Tenth Circuit's decision does not conflict with its prior decisions and the Petition should be denied.

2. Further, the Tenth Circuit correctly found that this Court's *Rooker-Feldman*[4] decisions bar federal district courts from hearing challenges to the validity of state court decisions appealable from the state court system to the U.S. Supreme Court.[5] This Court has clarified that *Rooker-Feldman* bars "a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the

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[3] *Id. at 1108.*

[4] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[5] *Rooker* at 476.

loser's federal rights."[6] Under the doctrine, a federal district court cannot review matters actually decided by a state court, or provide relief that is "inextricably intertwined" with the state court decision.[7] A claim is "inextricably intertwined" if the federal claims succeed only to the extent that the state court wrongly decided the issues before it.[8] In this case, the Tenth Circuit's opinion follows the Eighth Circuit's approach that ". . . *Rooker-Feldman* precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling."[9]

Petitioners specifically request the federal court to declare the Colorado statute unconstitutional, thereby rendering the state's termination judgment overturned or void. Petitioner's relief therefore requires the federal courts to upset a prior state court judgment applying Colorado's parental termination statute against them, and to render the underlying Colorado state court judgment "null and void" as a means for Petitioners to obtain the return Baby Girl or a new trial. The relief sought by Petitioners would restore parental rights to Baby Girl. The state court proceedings denied this relief. Therefore, Petitioners' claims in the federal court are "inextricably intertwined" with the state court judgment and are barred by the *Rooker-Feldman* doctrine. Thus, the Tenth Circuit correctly ruled that the federal court lacks jurisdiction in this case. For these reasons, the Petition should be denied.

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[6] *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994); see *Anderson v. Colorado*, 793 F.2d 262, 263 (10th Cir.1986).

[7] *Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1108 (10th Cir. 2000).

[8] *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995).

[9] *Charchenko* at 983.

## CONCLUSION

The Petition for Certiorari should be denied.

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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| | |
|---|---|
| JOLENE MCKEEL and<br>GERALD MCKEEL<br>Plaintiffs-Appellants,<br><br>v.<br><br>THE STATE OF COLORADO,<br>Defendant-Appellee. | No. 02-1303<br>(D.C. No. 02-Z-104)<br>(D. Colo.) |

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**ORDER AND JUDGMENT***

(Filed Aug. 25, 2003)

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Before **EBEL**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **MURPHY**, Circuit Judge.

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Plaintiffs-Appellants Jolene McKeel (Baby Girl's mother) and Gerald McKeel (Baby Girl's grandfather)

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* This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

argue on appeal that it is unconstitutional for Colorado to allow the final termination of parental rights to be decided by a judge instead of a jury. The plaintiffs-appellants, however, come before us late in the procedural history of their case. They failed to comply with an "abuse and neglect" plan to change the way they cared for their Baby Girl, and the Colorado state courts affirmed the termination of their parental rights.[1] We find that the exercise of federal jurisdiction over this case is barred by application of the *Rooker-Feldman* doctrine because plaintiffs-appellants seek, *inter alia*, to challenge on appeal the final decision of the Colorado state courts regarding custody of the Baby Girl.

## BACKGROUND

Because we dismiss plaintiffs-appellants' claim for lack of jurisdiction, we describe the facts of their case only briefly.

In the Colorado state system, first there must be a determination whether a child is neglected or abused such that the termination of parental rights would be appropriate. Both parties agree there is a right to a jury at this stage of the proceedings, and we accept that for purposes of this appeal since it is not contested. After the finding of facts to support the termination of parental rights is made, the actual execution of the termination may be suspended for some period of time to allow parents an opportunity to comply with a treatment plan. If the parents

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1 Plaintiffs-Appellants have appealed unsuccessfully to the Colorado Supreme Court, but it is not clear whether they petitioned for a writ of certiorari from the U.S. Supreme Court.

do not follow the treatment plan, the suspended judgment is then enforced by a court and official termination of parental rights is entered. *See, e.g., L.L. v. People*, 10 P.3d 1271, 1275 (Colo. 2000) (*en banc*) (describing the procedure under Colorado law). At this termination proceeding, there is no right to a jury and the matter is decided by the court. Colo. Rev. Stat. § 19-3-602(4).

On July 13, 1994, the State District Court for Mesa County, Colorado issued an "emergency custody and pick-up order" for the Baby Girl at issue in the McKeels' case. Plaintiffs-Appellants[2] were scheduled for an "abuse and neglect" proceeding under the Colorado Children's Code in Colorado state courts and they were given notice that an unfavorable disposition on the facts might result in the termination of parental rights. *See generally* Colo. Rev. Stat. §§ 19-3-502, 19-3503, 19-3-505, and 19-3-507. The McKeels stipulated to their abuse and neglect of the Baby Girl, however, so no trial occurred at this stage of the proceedings. Plaintiffs-Appellants were permitted to maintain revokable custody of the Baby Girl on the basis of a "corrective treatment plan" entered into with the state, but they ultimately failed to comply with its provisions.

On December 6, 1995, a Colorado state court judge found plaintiffs-appellants in violation of the treatment plan and entered the order terminating the

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2 We use the term "plaintiffs-appellants" throughout this opinion for both McKeel adults. Jolene McKeel was party to all proceedings in state court and her father intervened at the final disposition to present another option to the court in awarding custody to him when it was clear his daughter would lose her parental rights.

McKeels' parental rights.[3] Plaintiffs-Appellants appealed through the Colorado state court system, but provide no evidence they petitioned for a writ of certiorari from the U.S. Supreme Court.

On January 17, 2002, nearly five years after plaintiffs-appellants were denied relief by the Colorado Supreme Court, they filed suit in federal district court to attack Colorado's statute denying them a jury trial on the actual entry of the termination order. As of the time of the federal district court proceedings, the Baby Girl was almost eight years old and had been cared for by people other than the plaintiffs for more than six years. In the hearing before the federal district court, there was no answer to the judge's inquiry why the plaintiffs had waited so long to file their case.

The federal district court ruled from the bench to dismiss the suit. Throughout the hearing generally, the district court was troubled by why this case was in federal court and not in state court. The court, though, seemed to suggest three possible bases for its decision. First, the court said it did not have jurisdiction to restore the child to the plaintiffs because that was a matter for the state courts. Second, the court concluded that the Colorado statute denying a jury trial at the termination proceeding did not violate the federal constitution. Third, the court appeared to conclude that the plaintiffs had waived their claim for a jury determination when they knowingly entered into a stipulation at the first stage that a finding of abuse and

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3 Any rights Gerald McKeel had were terminated by extension of the termination of his daughter's rights to the child. *People ex rel. J.W.W.*, 936 P.2d 599, 601 (Colo. Ct. App. 1997).

neglect could be entered against them without a trial.

On appeal, the McKeels petition to have Colorado Revised Statute Section 19-3-602(4)[4] declared both facially unconstitutional, and unconstitutional as applied, rendering the state's previous termination proceedings "null and void." Plaintiffs-Appellants ask for Baby Girl to be restored to" them, or, in the alternative, for a "jury trial [on] the subject termination proceedings."

We DISMISS the McKeels' appeal for lack of jurisdiction because application of the *Rooker-Feldman* doctrine bars their claim.

## DISCUSSION

We review all issues of jurisdiction and law *de novo. See, e.g., Elder v. Holloway,* 510 U.S. 510, 516 (1994); *Dang v. UNUM Life Ins. Co. of Am.,* 175 F.3d 1186, 1189 (10th Cir. 1999).

Pursuant to 28 U.S.C. § 1257, "federal review of state court judgments can be obtained only in the United States Supreme Court" and, of course, review is limited to issues of federal law. *Kenmen Eng'z v. City of Union,* 314 F.3d 468, 473 (10th Cir. 2002) (quoting *Kiowa Indian Tribe of Okla. v. Hoover,* 150 F.3d 1163, 1169 (10th Cir. 1998)).

In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923),

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4 Colo. Rev. Stat. § 19-3-602(4) reads: "There shall be no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship."

the Supreme Court first held that the grant of statutory jurisdiction to the Court to review state court judgments could provide an independent basis for prohibiting collateral attack on state court judgments in the lower federal courts. The plaintiff in *Rooker* sought to have the judgment of a circuit court in Indiana, which had been affirmed by the Indiana Supreme Court, declared null and void in the lower federal courts as a violation of its federal constitutional right to contract. *Id.* 414.

But the U.S. Supreme Court wrote:

> It affirmatively appears from the bill that the judgment was rendered in a cause wherein the [state] circuit court had jurisdiction of both the subject matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs. *If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them, and their decision, whether right or wrong, was an exercise of jurisdiction.* If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding [only to the U.S. Supreme Court].

*Id.* at 415 (citation omitted and emphasis added).

Years later, the Supreme Court reaffirmed

*Rooker's* central holding that federal district courts do not have jurisdiction to hear challenges to the validity of state court decisions appealable from the state system to the U.S. Supreme Court. *Dist. of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983). As the Supreme Court has articulated since, the effect of *Rooker-Feldman* is to preclude "a party losing in state court . . . from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grande,* 512 U.S. 997, 1005-06 (1994); *Kenmen,* 314 F.3d at 473.

Plaintiff-Appellants essentially admit in their supplementary briefing that *Rooker-Feldman* may bar their challenge to the Colorado statute as applied. They argue, though, that their claim should be considered a challenge to the Colorado statute both as applied and more generally. They rely for this argument on a phrase from the *Feldman* case enabling a "general challenge" to a state statute to survive application of the *Rooker-Feldman* doctrine.

Under *Feldman,* a "general challenge" to the constitutionality of a statute may remain within a federal court's jurisdiction even after application of the *Rooker-Feldman* doctrine. *Feldman,* 460 U.S. at 482-83; *accord* Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 1502 (4th ed. 1996). The *Feldman* Court wrote that there was a distinction between as-applied challenges to statutes "seeking review in a federal district court of a state court's final judgment in a ... matter" and general challenges

"challenging the validity of a state ... rule." *Feldman*, 460 U.S. at 483-84.

It is not clear what general challenge plaintiffs-appellants may have made to the Colorado statute aside from their as-applied challenge. They employed the word "facial" just once in their brief on appeal in an introductory paragraph and present no broader argument against the Colorado statute distinct from the facts of their case as applied.[5] Although we do not believe that the McKeels have in fact asserted a general challenge separate from their challenge to the statute as applied, we may, nonetheless, easily determine that any facial claim the McKeels may have asserted would be barred by the "inextricably intertwined" test. Federal courts may not hear claims raised in the same suit as an issue barred by *Rooker-Feldman* if the claims are "inextricably intertwined" with the state court judgment. *Kenmen*, 314 F.3d at 475 (citing *Feldman*, 460 U.S. at 483 n.16).

A claim asserted in federal court is barred as "inextricably intertwined" with the state court judgment in which the case is rooted unless it falls into one of two categories. The first category consists of cases in which

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5 Traditionally, a party argued in an as-applied challenge that "a statute cannot be applied to her because its application would violate her personal constitutional rights." Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321 (2000). By contrast, a "facial" attack asserted that "a statute is more generally invalid" and should be struck down in all its applications. *Id.*; *id.* at 1326.

"the party does not request that the federal court upset a prior state-court judgment applying [the contested] law against the party, and ... the prior state-court judgment did not actually decide that the state law at issue was facially constitutional." *Kenmen*, 314 F.3d at 476 (citations and emphasis omitted). The second category consists of cases in which "a party may challenge state procedures for enforcement of a judgment [ ] where consideration of the underlying state-court decision is not required." Id. (citation omitted).

The McKeels' prayer on appeal was that we declare the Colorado statute to be unconstitutional, thereby rendering the state's previous termination proceedings "null and void" and "restor[ing]" the Baby Girl to them, or, in the alternative, granting a "jury trial [on] the subject termination proceedings." The McKeels' claim thus falls into neither of the two categories that might exempt it from being barred under the "inextricably intertwined" test for the *Rooker-Feldman* doctrine. Under the first category, the McKeels specifically request that the federal courts upset a prior state-court judgment applying Colorado's parental termination law against them. The McKeels' claim fails under the second category because we would be forced to consider the underlying Colorado state court judgment if we were to declare it "null and void" for the Baby Girl to be returned to the McKeels or for the McKeels to receive a new trial on the termination of their parental rights. Thus, even if the plaintiffs-appellants are raising a facial challenge, under the standard of the inextricably intertwined test for separate claims, no claim survives application of the *Rooker-Feldman* doctrine's bar on federal court jurisdiction.

## CONCLUSION

Accordingly, we hold that the *Rooker-Feldman* doctrine bars the McKeels' case from federal court and DISMISS the case for lack of jurisdiction.

ENTERED FOR THE COURT
David M. Ebel
Circuit Judge

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 02-Z-104 (MJW)

JOLENE MCKEEL and GERALD MCKEEL, Plaintiffs,
v.

THE STATE OF COLORADO,
Defendant,

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**ORDER OF DISMISSAL AND JUDGEMENT**

(Filed June 3, 2002)

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This matter was before the Court on May 2, 2002, for oral argument on defendant's Motion To Dismiss. The Court heard the arguments and statements of counsel, and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that defendant's Motion To Dismiss is granted. It is

FURTHER ORDERED that the Complaint and cause of action are dismissed. It is

FURTHER ORDERED that the parties shall bear their own costs.

DATED at Denver, Colorado, this 3 day of June, 2002, *nunc pro tunc* May 2, 2002.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Senior Judge
United States District Court

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**RULING**

[18] *THE COURT:* Well, there is many questions that I have about this case. For example, why on earth did plaintiff wait [19] so long to file an action? I know that the attorney is new, so he may not know the answer to this. Why wasn't this case brought in the state court, rather than the Federal Court, so that it could be challenged under the Colorado Constitution as well as Federal, and the various interests of the best interests of the child, which are properly examined by state judges and not by Federal judges?

In any case, this court is going to grant the motion to dismiss. I know of no case law which supports any finding that Colorado Revised Statute 19-3-602(4) is in violation of the Federal Constitution. That's the statute which says there shall be no right to a jury trial at proceedings held to consider the termination of parent/child legal relations.

As pointed out by defendant's attorney bringing this motion, when parties appear and ask for a jury trial on dependency and neglect issues, they are well aware that the remedy can be termination, and they are or should be well aware of the statute, which says that there is no jury trial for this second stage, for the remedy.

The second stage, which is a trial to the court, requires a

higher burden of proof. It requires clear and convincing evidence, not preponderance of the evidence. It appears to me that satisfies due process regardless of who the fact-finder is, whether it be judge or jury.

There is no law, as I pointed out. Due process is [20] indeed ensured by the higher standard of proof. We do have the Supreme Court case, which I think was mentioned in the briefs, which talks about the higher standard of proof. And I'm referring to *Santosky vs. Kramer*, 455 U.S. 745, 1982.

And then, in addition, we have a Wyoming Supreme Court decision holding that the right to a jury trial in a parental termination action cannot be characterized as fundamental and finding that there is no right to a jury trial under their interpretation of the law in Wyoming. Wyoming is certainly a close and persuasive jurisdiction to Colorado.

So I wonder whether this issue is really one for the Colorado legislature. I don't know whether there has been an attempt made to change the statute. I don't know whether coming in after all these years and attempting to restore the child to the plaintiff would be in the best interests of the child. I have no jurisdiction to consider that. That's a matter for the state courts.

My conclusion after hearing the arguments, after considering the briefs, after looking at the law and the policy behind the law, is that the statute in question is not unconstitutional and that the motion to dismiss must be granted and this case dismissed.

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